Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	PR Docket No. 94-103
	)	PR Docket No. 94-104
Implementation of Sections 3(n) and 332 of the Communications Act	)	PR Docket No. 94-109
	)	PR Docket No. 94-110
Regulatory Treatment of Mobile Services	)	

CONSOLIDATED REPLY OF GTE SERVICE CORPORATION TO CERTAIN COMMENTS TO STATE PETITIONS

GTE Service Corporation
On Behalf of Its Affiliates
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Contel Cellular Inc. and
Hawaiian Telephone Company
Incorporated

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GTE Service Corporation ("GTE"), on behalf of its affiliates, GTE Mobilnet Incorporated, Contel Cellular Inc. and Hawaiian Telephone Company Incorporated, hereby submits its Consolidated Reply to certain Comments to Petitions of the States of Arizona, Hawaii, Ohio, and Wyoming To Extend Rate Regulation of Commercial Mobile Radio Services filed in the above-referenced Dockets.[1] This Reply is being filed on a consolidated basis because the substance of the comments of each of the Commenters were substantially similar for each of the four petitioning states.[2]

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[1] The specific Comments addressed in this Consolidated Reply are as follows: American Mobile Telecommunications Association, Inc. ("AMTA"); E.F. Johnson Company ("Johnson"); Mobile Telecommunications Technologies Corp. ("Mtel"); National Cellular Resellers Association ("NCRA"); Nextel Communications, Inc. ("Nextel"); Paging Network, Inc. ("Paging Network"); and the Personal Communications Industry Association ("PCIA").

[2] GTE Mobilnet provides cellular services in numerous markets throughout the United States, and has filed its Comments in opposition to each of the states' petitions. GTE will submit separate Replies for the States of California, Connecticut, Louisiana, and New York, where each of the Commenters also filed substantively identical Comments.

Introduction and Summary

In its implementing Orders,[3] the Federal Communications Commission ("Commission" or "FCC") has established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). By doing so, it is faithfully implementing the intent of Congress to construct a symmetrical regulatory structure governing the provision of CMRS.[4] By revising the outdated categories of mobile services, Congress recognized it could further promote competition in the CMRS marketplace.

Most of the Comments addressed in this Consolidated Reply correctly oppose state rate and entry regulation of CMRS. Consistent with the Comments of GTE, they note that pursuant to Section 332 of the Communications Act of 1934 ("The Act"), as amended, competition within the petitioning states is adequate to protect consumers and that CMRS service is not a replacement for landline telephone exchange service for a substantial portion of the landline telephone exchange customers within those states.[5]

Some of the Commenters go one step further, however, by urging the Commission to deny the states' petitions to continue rate regulation of non-cellular services while simultaneously urging it

[3] See In the Matter of Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 72 RR 2d 147 (1993); Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Second Report and Order"); Third Report and Order, FCC 94-212 (1994) ("Third Report and Order").

[4] See The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) ("OBR").

[5] See 47 U.S.C. § 332(c)(3)(A)(i), (ii).

to continue rate regulation of cellular services. In any event, most of the Commenters propose special regulatory treatment for non-cellular services. GTE opposes this anomaly. The Commenters' proposal of disparate regulatory treatment for different mobile services with a high degree of substitutability contravenes the very reason Congress amended Section 332 of the Act--namely, to promote competition by regulatory parity.

In addition, the NCRA argues, in broad and unsupported terms, that the cellular market is uncompetitive and therefore deserves continued regulation by the states. However, the solid body of evidence submitted by GTE and other opponents of the states' petitions conclusively demonstrates that the provision of CMRS is competitive.[6]

Since the cellular market is competitive within each of the petitioning states, and because Congress clearly did not intend to punish cellular services by establishing a disparate regulatory regime over cellular CMRS, the Commission should reject the Commenters' arguments that support special regulatory treatment. Instead, the Commission should adopt the Commenters' arguments that support federal preemption of state rate regulation of all CMRS providers.

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[6] See Comments in Opposition to the States' Petitions filed by GTE Service Corporation (filed in all petitioning states); Bell South Corporation (Hawaii); McCaw Cellular Communications, Inc. (all states); and Bell Atlantic Metro Mobile Companies (Arizona).

I. CONGRESS AND THE FCC INTEND TO CREATE A UNIFORM, NATIONWIDE, SEAMLESS REGULATORY FRAMEWORK GOVERNING FUNCTIONALLY EQUIVALENT MOBILE SERVICES

A. Congress revised Section 332 to promote development of mobile radio services by regulatory parity of CMRS providers

In the OBR, Congress revised Sections 3(n) and 332 of the Act. Under the prior version of Section 332, land mobile services were classified into two categories: private land mobile services and public mobile services. Although "private" radio services effectively escaped regulation, public, or common carrier, mobile services eventually faced direct competition from these unregulated mobile services.[7] As a result, competing common carriers such as cellular operated at a regulatory disadvantage vis-a-vis the new mobile services such as traditional and Enhanced Specialized Mobile Radio ("SMR" and "ESMR") and Private Carrier Paging ("Paging").

In order to level the playing field between cellular and other functionally equivalent or substitute mobile services, Congress replaced the anachronistic categories with two newly defined categories of mobile services: commercial mobile radio service and private mobile radio service ("PMRS"). The Act, as amended, defined CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[8] PMRS means

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[7] In 1991, for example, the Commission authorized Nextel (then called Fleet Call, Inc.) to develop a wide-area, digital voice and data service that Nextel claimed was comparable or superior to cellular in quality. See Fleet Call, Inc., Memorandum Opinion and Order, 6 FCC Rcd 1533, recon. dismissed, 6 FCC Rcd 6989 (1991).

[8] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

"any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[9] Therefore, by definition, CMRS is a broad category for regulatory purposes.

Congress revised Section 332 because it found that the existing regulatory framework could "impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[10] Congress recognized that an even-handed approach to regulation was required to promote investment in mobile services.[11] The intent was to create a symmetrical national regulatory framework for mobile services, which, "by their nature, operate without regard to state lines as an integral part of the

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[9] Id., § 332(d)(2), 47 U.S.C. § 332(d)(2).

[10] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

[11] In an implementing order, the Commission stated:

> The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services--rather than as a burden standing in the way of entrepreneurial opportunities--and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Second Report and Order at para. 20.

national telecommunications infrastructure."[12]

In order to create this uniform regulatory framework, Congress re-classified mobile services and preempted state rate and entry regulation of CMRS.[13] The aim, it stated, was to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[14] To guide the Commission's implementation of revised Section 332, the legislative history instructs the Commission to "ensure that . . . similar services are accorded similar regulatory treatment."[15] The principle of regulatory parity, therefore, guides the Commission's treatment of competing mobile radio services.

B. The FCC recognizes that its mandate is to implement regulatory parity governing similar mobile radio services

The Commission has acknowledged its mandate to bring about regulatory parity: "Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[16] In interpreting this mandate, the Second Report and Order adopted "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS

[12] House Report at 260.

[13] See Communications Act, § 332(c).

[14] House Report at 260 (emphases added).

[15] H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) (Conference Report).

[16] Second Report and Order at para. 23.

providers by this Order."[17] The Commission further stated that its interpretation of the CMRS definition[18]

> ensures that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs--and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[19]

As part of its implementation of revised Section 332, the Commission reviewed the level of competition in the CMRS marketplace. The purpose of this review was to determine whether the Commission should exercise its forbearance authority as established by Congress in the OBR. Although the Commission reluctantly declined to treat CMRS as a single market for purposes of the forbearance analysis, it found that forbearance from certain Title II provisions was warranted in the case of all CMRS providers.[20]

Echoing its mandate, therefore, the Commission found that above a baseline level of actual competition--i.e., an area where industry growth is promoted and customers are protected--similar mobile radio services will be accorded similar regulatory

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[17] Id. at para. 15 (emphasis added).

[18] The Commission elsewhere concluded that CMRS providers include all cellular licensees, most common carrier paging licensees, all wide-area SMR providers, and most SMR providers. Id. at para. 139.

[19] Id. at para. 19.

[20] Id. at para. 137.

treatment.[21] Each of the classes of CMRS services, the Commission concluded, including cellular services, operates in this competitive area.[22] Accordingly, with respect to the removal of federal regulatory restraints, cellular providers will be treated in a manner similar to all other CMRS providers.[23]

In its forbearance analysis, the Commission focused on the level of actual competition within the individual categories of CMRS. "[O]ur doing so, it stated, is not intended to prejudge the issue of whether, and to what extent, there is competition <u>among</u> various classes of CMRS services."[24] That judgment took place in the Commission's <u>Third Report and Order</u>, where, for purposes of determining the technical and operational rules governing CMRS, it adopted a "broad approach" for determining whether and to what extent the various classes compete with one another.[25] If the reclassified "classes" compete with one another, the Commission explained, then CMRS should be treated as a single marketplace of "substantially similar" services.[26]

In its <u>Third Report and Order</u>, the Commission explained that in fashioning its technical and operational rules, it will be guided by the level of actual and potential competition among the

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[21] <u>Id.</u> at paras. 137-39.

[22] <u>Id.</u>

[23] <u>Id.</u>

[24] <u>Id.</u> at para. 125 (emphasis added).

[25] <u>Third Report and Order</u> at para. 37.

[26] <u>Id.</u>

"classes" of CMRS. It then concluded that "all commercial mobile radio services compete with one another, to meet the needs of consumers to communicate while on the move".[27] Thus, although it will regard the "classes" of CMRS separately for purposes of assessing the states' petitions, the Commission overwhelmingly favors viewing the provision of CMRS as a single marketplace. Absent such an approach, the Commission could not fulfill its mandate to create a symmetrical regulatory regime over CMRS.[28]

II. THE COMMENTERS SHOULD NOT BE ACCORDED SPECIAL REGULATORY TREATMENT IN THE PETITIONING STATES

Most of the Commenters ask for special treatment in the four petitioning states. Although none of the Commenters support continued state rate regulation of non-cellular services, their arguments go too far by urging the Commission to carve out of Section 332 a regulatory exception for non-cellular services. Stated differently, whereas the Commission has expressed its fidelity to Congress' overall scheme of state and federal regulatory parity, the Commenters argue in favor of disparity and unequal regulatory advantage. In short, they propose exactly the sort of regulation which Congress sought to reverse, and which the Commission sought to avoid in fashioning its preemption rules and making its forbearance determination.

For example, Mtel states that "even if the Commission were to grant the [Ohio] PUCO petition, paging and narrowband PCS services

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[27] Id. at paras. 37, 43.

[28] Id. at para 42.

must be exempted from any rate and entry regulation. . . ."[29] Similarly, Johnson maintains that "different regulatory treatment is appropriate for different categories of CMRS licensees," and so it "continues to urge the Commission to exempt 'local' [SMR] systems from CMRS obligations."[30] "[U]ntil such time that effective competition arrives, perhaps in the form of [PCS] and [ESMR], continued rate regulation is necessary to restrain the dominating market power of cellular duopolists."[31] "The states have failed to demonstrate that rate regulation of emerging non-dominant CMRS [such as ESMR] providers is necessary to protect the public from anti-competitive practices and other abusive behavior."[32]

In general, the Commenters' arguments in favor of special treatment run along two lines: (1) the states' petitions fail to either mention or prove the existence of market failure in the states' non-cellular markets;[33] or (2) eliminating state rate regulation of "incumbent cellular operators" would permit predatory practices that could inhibit the competitiveness of non-cellular providers.[34]

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[29] Mtel Comments at 6; see also PCIA Comments at i.

[30] Johnson Comments at 3-4.

[31] NCRA Comments at 2-3.

[32] Nextel Comments at 10.

[33] See Johnson Comments; AMTA Comments; Mtel Comments; Paging Network Comments; PCIA Comments.

[34] See Nextel Comments; NCRA Comments.

A. GTE supports the Commenters' opposition to continued state rate and entry regulation but opposes their proposal for disparate regulation of similar "classes" of CMRS

GTE has submitted its Comments in opposition to the four states' petitions. Since the level of competition in those states adequately protects CMRS subscribers and CMRS is currently not a replacement for a substantial portion of the landline telephone exchange service, the states should be preempted from any rate and entry regulation. Underlying GTE's position is its view that the CMRS marketplace must necessarily be regarded uniformly, as a single market of competing technologies.

While cellular service is competitive in its own right, cellular, ESMR, SMR and paging providers also compete with one another, or have the potential to compete with one another, to serve mobile radio services customers. As noted above, the Commission has concluded that "all commercial mobile radio services compete with one another, or have the potential to compete with one another."[35] In particular, "[t]oday, there is general agreement that wide-area SMR service is developing as a competitor to the cellular industry."[36] Further, "SMR operators also are positioning themselves to compete against cellular carriers."[37] With respect to paging, the Commission expects that CMRS services such as

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35 Third Report and Order at para. 43.

36 Id. at para. 72.

37 Id. at para. 73.

cellular, SMR and PCS will provide competition to paging.[38] The emergence of PCS will merely add one more log to this fire.

GTE supports the Commenters' opposition to state rate and entry regulation, but only if the CMRS marketplace is viewed in its proper light--namely, as a single market for purposes of regulation. Regulatory parity--not regulatory preference--guides the Commission's implementation of revised Section 332.

B. The Commenters' proposals would create a non-symmetrical regulatory structure that is anti-competitive

By proposing that "classes" of CMRS be singled out for federal preemption to the exclusion of similar competing CMRS, the Commenters are proposing to construct a non-symmetrical, checkerboard regulatory structure. Such a proposal, however, can only lead to diminished competition in the CMRS marketplace. The Commenters offer several arguments in support of this retrograde structure.

A common theme taken up by the Commenters is that the duopoly system of facilities licensing is anti-competitive. For example, the NCRA claims that "continued rate regulation is necessary to restrain the dominating market power of cellular duopolists."[39] Similarly, Nextel maintains that "[c]ontinued regulation of cellular providers may be necessary to prevent anti-competitive practices that will stifle the development of the wireless

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[38] Id. at para. 35.

[39] NCRA Comments at 3.

marketplace."[40] Such statements smack of "regulatory strategies" intended to disadvantage cellular providers.

The basis of the Commenters' claim that restraint may be required is the states' tired argument that until "full" competition--whatever that is--is achieved in the cellular services marketplace, state rate regulation is warranted. It is then conveniently claimed that that level of competition can never be achieved under the existing duopoly system. The ultimate impact of the Commenters' proposals would be dual regimes of perpetual state regulation of cellular services and no state regulation of non-cellular services.

Regulation of cellular services is not only bad public policy; it also cannot be justified under the prevailing market conditions within the petitioning states. In their Comments in opposition to the states' petitions, GTE and others provided studies by independent economists who described the existence of actual and incipient competition within the petitioning states' CMRS markets.[41] By contrast, neither NCRA nor the other non-cellular Commenters supplied any factual basis to support their contention that the cellular market is non-competitive. Just as the petitioning states failed to clear the substantial hurdles of

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[40] Nextel Comment at 10.

[41] See, e.g., GTE Service Corporation (all states [Stanely M. Besen, Charles River Associates, "Concentration, Competition and Performance in the Mobile Telecommunications Services Market" (1994)]). Comments of the Cellular Telecommunications Industry Association (filed in all petitioning states); Comments of Bell South Corporation (Louisiana); Bell Atlantic Metro Mobile Corporation (Arizona).

Section 20.13 of the Commission's Rules, so too have the non-cellular Commenters, who have added nothing to the merits of the states' petitions.

As present or future competitors of cellular services, the Commenters would enhance their own market prospects by handicapping providers of cellular services. For example, if disparate regulations are applied in the petitioning states, then the pricing strategies of cellular providers will be known well in advance of their implementation and thereby afford non-cellular competitors the opportunity to respond by adjusting their prices favorably. The result will be dampened competition and fewer consumer benefits. However, non-cellular providers should not be permitted to so brazenly undermine the benefits to be derived from Congress' revision of Section 332. Competition, not regulatory advantage, should determine success in the CMRS marketplace.[42]

Conclusion

The keystones of Congress' revision of Section 332 were regulatory parity of all commercial mobile services and federal preemption of state rate and entry regulation. The Commenters' proposals for special regulatory treatment would undermine these twin objectives.

By arguing that non-cellular services should be viewed apart

[42] As quoted above, the Commission believes that "[s]uccess in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs--and not by strategies in the regulatory arena." Second Report and Order at para. 19.

from cellular services, the Commenters are asking the Commission to grant them a competitive advantage. Yet, since the provision of cellular service within the four petitioning States is competitive, there is no valid reason to treat any "class" of CMRS differently. Moreover, since there is actual and potential competition among the "classes" of CMRS, it follows that the CMRS industry must be regarded as a single marketplace, and thus deserving of uniform rules. Any other approach would be anti-competitive and contrary to Congress' intent to create a symmetrical regulatory structure governing CMRS.

WHEREFORE GTE Service Corporation respectfully requests that the Commission reject the Commenters' proposals for special regulatory treatment as well as rejecting continued state rate and entry regulation of all CMRS providers, including cellular carriers.

Respectfully submitted,

GTE Service Corporation
On Behalf of Its Affiliates
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October 4, 1994

CERTIFICATE OF SERVICE

I, Donald J. Evans, do hereby certify that a copy of the foregoing "Consolidated Reply of GTE Service Corporation" was mailed by First Class U.S. Mail, postage prepaid, this 4th day of October, 1994 to the following:

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